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Constitutional Law - Damages for Breach of Restrictive Covenants

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assist in the presentation of the case was held to be privileged. In *State v. Loponio*,[13] the defendant, who was unable to write, employed another to write a letter to his attorney and the communication was held to be privileged. Also, communications made to an attorney in the presence of his clerk and stenographers do not come within the general rule that communications made in the presence of third persons are not privileged because the use of these agents is indispensable to the attorney's work.

In a situation such as the one here presented, it is definitely necessary to employ the agency of a physician to interpret the injured person's symptoms and conditions and determine the nature and extent of his injuries. Without such an examination a person cannot adequately pursue his remedy at law. Insurance companies will not consider the settlement or payment of a claim without a medical report.

Thus, in jurisdictions, such as Illinois, which do not have statutes creating the physician-patient privilege, communications made to a physician may come within the attorney-client relationship and be privileged as confidential. The attorney-client privilege does not depend on a statute for its existence as it is one recognized by common law and protected throughout the United States. It would seem to be a useless right if agents of the client and the attorney, necessarily employed by them, did not come within the privilege. It would confuse the client and hamper the ends of justice if only certain agents of the client or attorney were protected; the client would be hesitant to entrust any agent with information for fear it could be brought out in open court to his detriment. Therefore, the mere fact that a state does not have a statute creating a physician-patient privilege should not prevent communications made to a physician from being privileged under the attorney-client relationship where it is necessary to employ such an agent.

CONSTITUTIONAL LAW–DAMAGES FOR BREACH OF RESTRICTIVE COVENANTS

Plaintiffs sought to enforce racial restrictive covenants against white sellers and negro purchasers of restricted land. The Supreme Court of Oklahoma ruled that a state court could not enforce racial restrictive agreements in such a way as to work a forfeiture of land validly purchased by these restricted parties. However, the court said that a state court could enforce an action for damages against the defendants because they had conspired to evade these covenants. *Correll v. Early*, 237 P. 2d 1017 (Okla., 1951).

In *Shelley v. Kraemer*,[1] the landmark case in regard to racial restrictive

[13] 85 N.J.L. 357, 88 Atl. 1045 (S. Ct., 1913).

[1] 334 U.S. 1 (1948).

covenants, it was made clear that state action, whether it be executive, legislative, or judicial, could not deprive racially restricted persons of land validly purchased by them because such action would be a denial of equal protection of the law as guaranteed by the Fourteenth Amendment. Whether state enforcement by means of an action for damages for the breach of a restrictive covenant would be discriminatory state action and prohibited by the Fourteenth Amendment was not decided.

It was specifically pointed out in the *Shelley* case that in order to bring such covenants within the scope of the constitutional power of protection, it must be shown that state action had operated against the excluded party. As a corollary to this, it was said:

> That Amendment (Fourteenth) erects no shield against merely private conduct, however discriminatory or wrongful. We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to the petitioners by the Fourteenth Amendment.[2]

The Supreme Court of Oklahoma has construed the above-quoted statements as giving an independent validity to restrictive covenants, a validity which allows a damage action for their breach to be entertained and enforced by a state court and thus effects a result that the *Shelley* case by spirit, though not by express words, seeks to abolish. These statements seem merely to mean that in order to invoke the operation of the Fourteenth Amendment, a person must prove that the discrimination was accomplished by state action as distinguished from private action. He must also show that the state, acting through its judiciary in giving efficacy to these agreements, is abridging the right to equal protection of the law as guaranteed by the Fourteenth Amendment.

The Oklahoma court in the instant case agrees that the state is powerless to cancel a contract, oust the purchaser, or exact other measures which would work a forfeiture of the restricted land. In regard to the alienation of restricted land, it is not disputed that restrictive covenants have no legal effect; once a state attempts to enforce racial restrictive covenants, the Fourteenth Amendment will effectively prohibit such state action, although a private citizen has petitioned the state to act.[3]

The *Shelley* case had said, "So long as the purposes of those agreements are effectuated by *voluntary adherence* to their terms, it would appear clear, that there had been no action by the state and the provisions of the Amendment have not been violated."[4] The Oklahoma Court has not over-

[2] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). An illustration of how far the term "private conduct" can be stretched is found in Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E. 2d 541 (1949).

[3] For state decisions which discuss the Shelley case more fully, see Coleman v. Stewart, 33 Cal. 2d 703, 204 P. 2d 7 (1949); Tovey v. Levy, 401 Ill. 393, 82 N.E. 2d 441 (1948); Goetz v. Smith, 191 Md. 707, 62 A. 2d 602 (1948); Rich v. Jones, 142 N.J. Eq. 215, 59 A. 2d 839 (Ch., 1948).

[4] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

looked this sentence but it has, perhaps, overlooked the application of the words "voluntary adherence." It is true that private landowners may, with impunity, enter into restrictive agreements and they may adhere to them by refusing to negotiate contracts with persons whom they seek to exclude. The excluded person who attempts to penetrate the barrier has no effective weapon to accomplish this because there does not now exist an express constitutional provision or statute which prohibits such voluntary adherence by private parties. An illustration of this is *Dorsey v. Stuyvesant Town Corporation*,[5] where the court stated that a private housing corporation, although created in part by the financial and governmental aid of the state, was still a private party, and, as such, could not be forced to admit restricted persons as tenants.

In *Correll v. Early*,[6] racial agreements are held valid, with regard to damages, merely because private parties may enter into them and adhere to them with impunity. However, it may be asked how they can ever become legally binding agreements, subject to the same remedies as other valid agreements, unless the state enforces them. "Voluntary" implies free will. By subjecting the covenantor to a civil suit for damages should he decide to sell to a restricted person, the voluntary agreement is actually being enforced by state action.

Weiss v. Leaon[7] is the only other state court decision determining the validity of a damage action for the breach of a restrictive racial covenant. The rationale of that decision, although it followed the *Shelley* case in denying injunctive relief or specific performance of the covenants, held that the agreements had sufficient validity in themselves to warrant an action for damages for their breach. Not differing materially from the instant case, the Missouri Supreme Court chose to be bound only to the specific question presented in the *Shelley* case and felt free to determine the question of damages.

Roberts v. Curtis,[8] a case arising in the United States District Court for the District of Columbia, is opposed to the proposition expressed by the Missouri and Oklahoma decisions. The federal court held that although *Shelley v. Kraemer*[9] did not decide this question, the case was broad enough to include damage actions in the same category as the enforcement of racial restraints.

Although *Shelley v. Kraemer*[10] did not determine the constitutionality of state-enforced damage actions for the breach of racial covenants, such state action indirectly effects a result that is not in keeping with the underlying spirit of that decision. Until the Supreme Court of the United

[5] 299 N.Y. 512, 87 N.E. 2d 541 (1949).

[6] 237 P. 2d 1017 (Okla., 1951).

[7] 359 Mo. 1054, 225 S.W. 2d 127 (1949).

[8] 93 F. Supp. 604 (D.C., 1950).

[9] 334 U.S. 1 (1948).

[10] Ibid.

States does determine the constitutional question involved in the present case and the prior case of *Weiss v. Leaon*,[11] the problems flowing from racial restrictive covenants will continue to remain, in part, unsolved.

TORTS–RIGHT OF WIFE'S ADMINISTRATOR TO RECOVER FROM HUSBAND'S ESTATE UNDER WRONGFUL DEATH STATUTE

After shooting his wife, a husband then shot and killed himself. The wife died a few minutes after her husband and was survived by a minor daughter by a previous marriage. A suit was brought against the executor of the husband's estate by the administrator of the wife's estate. The trial court gave judgment for the defendant notwithstanding the verdict of the jury for the plaintiff. Judgment was affirmed by the Illinois Appellate Court for the Third District[1] but was reversed by the Illinois Supreme Court in *Welch v. Davis*, 410 Ill. 130, 101 N.E. 2d 547 (1951).

The Appellate Court had based its decision denying recovery on its construction of the Married Women's Act[2] and the Wrongful Death Statute[3] and held that the Married Women's Act did not give a wife the right to sue her husband for a personal tort. Therefore, since the wife could not maintain an action against her husband during her lifetime, her administrator could not maintain an action for her wrongful death.

The Supreme Court's reversal was based on an interpretation of the Wrongful Death Statute only. The court reasoned that the statute meant to create a new cause of action in the next of kin, that the disability of the wife to sue was personal, that the marriage had been terminated and that, therefore, there was no reason to extend the inability to the beneficiaries under the act.

At common law a person was not liable in tort for causing the death of another.[4] A cause of action for personal injuries did not survive the injured party, and there was no action to recover damages caused by the death of someone else. Recognizing the injustice of the situation, and the beneficial interests that one party may have in the life of another, legislatures passed what are commonly referred to as Wrongful Death Statutes. Generally, these statutes give a cause of action to the next of kin of the deceased if the deceased would have been able to maintain a suit, had death not ensued.

Such defenses as contributory negligence and self defense, which miti-

[11] 359 Mo. 1054, 225 S.W. 2d (1949).

[1] Welch v. Davis, 342 Ill. App. 69, 95 N.E. 2d 108 (1950).

[2] Ill. Rev. Stat. (1951) c. 68, §§ 1–21.

[3] Ill. Rev. Stat. (1951) c. 70, §§ 1, 2.

[4] 25 C.J.S., Death § 13 (1941); 16 Am. Jur., Death § 44 (1938).